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U.S. SUPREME COURT, U.S.
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No. 651

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

KENNETH JOHN BERRY, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

REPLY TO THE BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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In this short reply, petitioner will not address himself to the government's argument that petitioner's objection to the trial court's charge comes too late. This court has already decided that question adversely to the government in the cases cited in the petition for certiorari (Pet. 7-8).

Petitioner feels it necessary to remark, however, that it is hardly fair to argue that the judge's instruction allowing a conviction even if petitioner's intent was lawful "was obviously not misleading since it was coupled with the word 'fraudulent' . . ." (Br. 5). It is true that the word "lawful" was "coupled" with the word "fraudulent", but it was "coupled" by the disjunctive "or", a "co-ordinating particle that marks an alternative; as, you may read or may write,—that is, you may do one of the things at your pleasure, but not both." *Webster's New International Dictionary (Unabridged)*, 2nd Ed., 1950, p. 1712.

Thus the jurors were left to choose between mutually exclusive alternatives, one of which was obviously incorrect. This is exactly what this court condemned when it said:

> "The Government's suggestion really implies that, although it is the judge's special business to guide the jury by appropriate legal criteria through the maze of facts before it, we can say that the lay jury will know enough to disregard the judge's bad law if in fact he misguides them. To do so would transfer to the jury the judge's function in giving the law and transfer to the appellate court the jury's function of measuring the evidence by appropriate legal yardsticks." *Bollenbach v. United States*, 326 U.S. 607, 613-614.

It is also not enough to suggest that the error is harmless "since the judge also read that part of the statute which provides that the defendant must know the security to have been falsely made, forged or counterfeit." (Br. 5.) Knowledge of the false character of the instrument is an element of the offense completely separate from the defendant's intent. If the government's theory of the case is correct some official of the New York clearinghouse undoubtedly knew that the security was falsely made when he caused its interstate transportation by returning it to Florida. Certainly such an official would not, however, also have the requisite criminal intent.

The completely inaccurate and inadequate nature of these instructions is too important, petitioner submits, to be dismissed casually as a "slip of the tongue" (Br. 4-5). This court has emphasized time after time that a defendant has a fundamental right to have the jury correctly instructed in the fundamental law of the case. In the

exercise of this court's supervisory responsibility over inferior federal courts, this court should again recognize the importance of the questions presented in this petition and should reverse this conviction, not only so that petitioner may have a trial at which his guilt or innocence is established by appropriate legal criteria, but also so that the attention of trial judges is redirected to the importance of their function in charging juries.

Respectfully submitted,

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Certificate

I certify that copies of the above and foregoing Reply to Brief in Opposition were dispatched to the Solicitor General, Department of Justice, Washington 25, D. C., and to Miss Lavinia L. Redd, Assistant United States Attorney, United States Court House, Miami, Florida, air mail postage prepaid, this 16th day of February, 1960.

William F. Walsh, Esq.